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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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No. 36

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Petitioner*

*v.*

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

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No. 55

VICE ADMIRAL HYMAN G. RICKOVER, *Petitioner*

*v.*

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Respondent*

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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## REPLY BRIEF FOR PUBLIC AFFAIRS ASSOCIATES, INC.

(Petitioner in No. 36 and Respondent in No. 55)

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## REPLY BRIEF FOR PUBLIC AFFAIRS ASSOCIATES, INC.

(Petitioner in No. 36 and Respondent in No. 55)

Public Affairs Associates, Inc., Trading as Public Affairs Press, respectfully submit this reply brief to indicate that the brief submitted by Respondent Admiral fails to present any valid reason for denial of the relief requested by the Petitioner.

## I. FREEDOM OF PRESS

### A. Respondent's arguments would undermine the structure of the Government's information services and the American people's "right to know".

Respondent's arguments, if accepted, would make a shambles of press coverage of Government departments and would undermine the entire structure of Government information services to the American people.

"Nowhere", says Respondent's Brief (p. 26), "do they [the speeches] purport to express or explain official activities or pronouncements."

Nowhere, of course, except

—in official Government press releases, issued by his employer agencies, without any disclaimer, either by the Government or the Admiral, of the official status of these documents,

—in official publications providing the public and the press with the statements of a high-level Government officer,

—in official advice, on the face of such documents, that other Government officers are available for further information statements.

How else can the United States Government advise the press and the American people that a document is official other than by the means here used—labelling it as such, treating it as such, and issuing and distributing it as such?

Respondent's disregard for the public's *right to know* is patent in the statement of his Brief that "This question of the

use of a disclaimer. . . . is not one of substance" (p. 41). If this be correct, chaos would result in the American press. The press would never be able to know when an official Government press release could be accepted on its face as official. Each such release would have to be individually checked to determine whether it was an official or a private document. Furthermore, if the document could not speak for itself, whom could the press trust to say whether it was or was not official? And if what appears to be official can be retroactively designated as private, how is the American public to know what is official and what is private?

It is respectfully submitted that this whole proposition advanced by the Respondent, that an official Government press release is *not* an official Government press release, is too preposterous, and too dangerous to the public welfare, for serious consideration.

Furthermore, Respondent's brief seeks to confuse the issue by citing his book as proof that his *speeches* were not official (p. 26). Petitioner has clearly stated that it raises no issue about the book (Brief, p. 38, note 61); the speeches, however, are not controlled by the book's status.[1]

Respondent's Brief (p. 36) seeks to dismiss three cases cited in Petitioner's Brief (*Barr v. Matteo*, *Spalding v. Vilas*, and *United States v. MacDaniel*) with the comment that "In these cases the officials were purporting to act in the line of duty and on behalf of the Government." In the instant case the record shows that Admiral Rickover was "purporting to act in the line of duty and on behalf of the Government." This is precisely what Admiral Rickover did by

—issuing his speeches as official Government press releases, and with all his official titles as identification, using the whole

[1] Respondent's book contains only 9 of the 23 speeches involved in this proceeding, all 9 admittedly "substantially rewritten". The book does not include any of Respondent's 10 speeches dealing with nuclear energy or with the effect of atomic power on naval warfare, on the industrial construction of naval vessels or on the production of electric power from nuclear energy.

panoply of official Government auspices, facilities, and services to publicize them as official documents, and by

—failing or refusing to disclaim official status for the speeches, as he was required by the Department of the Navy to do if they were personal. See Petitioner's Brief, pp. 5-6.

Respondent's apparent misconception of the relevant constitutional issue results in his claim (on page 52) that "The First Amendment does not confer upon publishers . . . any constitutional right of access to *information not available to others*" (emphasis added).

Petitioner does not claim any right of access to information not available to all others to whom the Constitutional guaranty applies. On the contrary, it is only because of the Petitioner's claim that the particular official information involved is *open to all* that Petitioner claims that it, too, has such right of access. Consequently, not only are the cases cited by the Respondent at the noted page irrelevant to the issue, but the issue as stated by the Respondent is irrelevant to the instant case.

### B. "Fair use" doctrine inapplicable here

Respondent would deny Petitioner's claim to a Constitutional right of Free Press on the ground that the press's only protection is through "fair use". (See Respondent's Brief, pp. 48-50, and his Cross-Petition, No. 739, Oct. Term, 1960, p. 14). The doctrine of "fair use" is almost wholly inapplicable to the facts of the instant case and, in any event, cannot be used as a substitute for a constitutional right of Free Press:

*(1) "Fair use" applies only to copyrighted works*

The doctrine of "fair use" does not apply to unpublished and uncopyrighted works.[2] It is undisputed that the first 22

[2] BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 note 5 (1944). To the same effect, see: Smith, *The Copying of Literary Property in Library Collections*, 46 LAW LIB. J. 197, 200 (1953) (" . . . the doctrine of *fair use* does not apply to unpublished literary works in the United States"); Lattman, *Fair Use of Copyrighted Works*, in COPY-

speeches were not copyrighted at the time they were delivered and issued as official Government Press releases (R. 7). (The gravemen of Respondent's argument is that these speeches were not "published" when so issued.[3]) Consequently, so far as these 22 speeches are concerned the Respondent's argument on "fair use" falls of its own weight as inapplicable to the admitted and undisputed facts of this case.

*(2) "Fair use" fails to protect people's "right to know"*

The "fair use" doctrine is so ill-defined, so undependable in actual use, and so limited in scope that it denies to the public any real protection for its "right to know" what Government officials say and do in their official capacity.

*(a) "Fair use" too undefined*

The Register of Copyrights says that the term "eludes precise definition."[4] Smith, a Senior Attorney in the Copyright Office, says that it is "a vague concept; its limits have never been defined."[5] And Lattman, Special Advisor to the Copyright

RIGHT LAW REVISION, Studies Prepared [by the Copyright Office] for the Subcom. on Patents, Trademarks, and Copyrights, Sen. Jud. Com., Pursuant to Sen. Res. 240, 86th Cong., 2d Sess. (1960), Study No. 14, p. 7 (" . . . the fair use doctrine does not apply to common law literary property"); Wilson, *The Scholar and the Copyright Law*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 10, at 113 (1960) ("Yet our courts have consistently held that unpublished material . . . is not even subject to fair use"). Cf: Register of Copyrights, COPYRIGHT LAW REVISION, *A Report on the General Revision of the U. S. Copyright Law*, House Com. Print, House Comm. on Jud., 87th Cong., 1st Sess., July 1961, p. 24 [hereinafter referred to as *Report of Register of Copyrights*]; Copyright Office, *"Fair Use" of Copyrighted Works*, Bull. No. 20, ¶2 (1958). See also Copyright Law, 17 U.S.C. 2.

[3] Respondent himself rejected the applicability of the "fair use" doctrine in the instant case when, at the very outset and before knowing what portions and how much the Petitioner wished to quote, he refused permission to Petitioner "to quote" even in part. R. 68.

[4] *Report of Register of Copyrights, supra*, at p. 24.

[5] Smith, Copying of Literary Property, 30 LIBRARY J. 23, 24 (Jan. 1, 1955).

Office and author of its Special Study on "Fair Use", writes: "Fair use is not a predictable area of copyright law." [6] The Court of Appeals for the Second Circuit has called it "the most troublesome problem in the whole law of copyright." [7] The Executive Director of the Copyright Society of the U.S.A. and editor of its *Bulletin*, Walter Derenberg,[8] states that the term "defies definition." [9]

*(b) "Fair use" too undependable*

Reliance on "fair use" can be an exercise in futility or even worse, merely buying a law suit, since "there is no yardstick . . . whereby to measure what is and what is not fair use in any particular case." [10] The public's right to know is thwarted because there is no way for either author or publisher to know how much can be used or quoted under the "fair use" doctrine.[11] Even where "fair use" seems reasonably applicable, it is dangerous to request the author's permission (in the event of refusal) and equally dangerous not to obtain such consent. For example, the following advice appears in a copyright manual for publishers, authors, and literary agents:

"'Fair use' is a ticklish subject. Unless you want to run the risk of spending time and money defending your right of 'fair use' (and few publishers do), it is much the safest policy to get the author's consent." [12]

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[6] Lattman, *op. cit supra*, at 14.

[7] Dellar v. Samuel Goldwyn, Inc., 104 F. 2d 661, 662 (2d Cir. 1939).

[8] Derenberg, comments on Lattman study, *op. cit. supra*, at 39.

[9] Needham, *Tape Recording, Photocopying and Fair Use*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 6, p. 75, 77, 80 (1959). See also Cohen, *Fair Use in the Law of Copyright*, id., 42, 52.

[10] Smith, *op. cit. supra*, note 2, at 256.

[11] SEIDEL, WHAT THE GENERAL PRACTIONER SHOULD KNOW ABOUT TRADEMARKS AND COPYRIGHTS 138-39 (1959); Cohen, *op. cit. supra*, at 68.

[12] NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE FOR WRITERS, PUBLISHERS AND AGENTS 187 (1956).

Elsewhere the same manual advises that "If permission is asked and refused, however, it is most unwise to use the material, whether the use be fair or not." [13] The present case is ample evidence of the wisdom of this latter advice.

The practical undependability of "fair use" is further illustrated in the recent experience of a scholar who wrote a work including brief quotations from copyrighted materials. The scholar's sad conclusion, as set forth in the *Bulletin* of the American Association of University Professors, is that in actual experience one must abandon reliance on "fair use" unless he is willing to risk lawsuits and lose his publisher.[14]

It is not without good reason that the Copyright Office advises authors, in effect, to ignore "fair use" and instead to obtain permission or else seek legal advice.[15] Poor protection, this, for the public's *right to know*.

*(c) "Fair use" too limited*

The limited applicability of "fair use" demonstrates its complete failure to protect the public's right to know.

*(i) No commercial use.* The Constitutional right of Free Press is not forfeited because the press may profit by the exercise of its right. On the other hand, "fair use" is denied to anyone who desires merely to quote material with commercial motives, irrespective of the harm thus done to the public's *right to know*. The bellwether statement of this basic limitation comes from Mr. Justice Story, sitting on circuit, when he set forth criteria for the doctrine as "the objects of the selection made, the quantity and value of the materials used and the degree in which the use may prejudice the sale, or diminish the profits, or supercede the objects, of the original work." [16]

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[13] *Id.* at 93.

[14] Houghton, *Let's Make Fair Use of "Fair Use"*, 47 A.A.U.P. BULLETIN 56 (Spring 1961).

[15] Copyright Office, Bull. No. 20, *supra*, ¶5.

[16] Folsom v. Marsh, 9 Fed. Cas. 342, 348, No. 4901 (C.C.D. Mass. 1841). In the instant case the court below remanded to the District

The Register of Copyrights recently outlined four criteria for "fair use" and concluded that "the fourth one—the competitive character of the use—is often the most decisive." [17] Ball has said that, "the use of a quotation from a copyrighted work for a profitable commercial purpose, as distinguished from professional motives, is not a fair use", [18] and Judge Yankwich wrote that if "the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, *regardless of quantity*, is unfair." [19]

Is "fair use", under such rule of law, of any help at all to daily newspapers, weeklies, radio and TV, or book publishers? All these media are commercially motivated in our free enterprise society; they are, of course, in business to make a profit and necessarily "to derive a commercial benefit". Would they be entitled to "fair use" under the above-stated rule?

Even if the "fair use" rule were applicable to the instant case, it is poor solace indeed either to a claimant of the Constitutional right of Free Press or to the American people whose protection was intended by the right of Free Press. The founders of the Republic established the constitutional guaranty fully aware that the press of the then-budding nation was a commercial enterprise. It is reasonable to believe that they saw in such commercial motivation itself a substantial protection for the underlying purpose of the Constitutional guaranty (*e.g.*, the people's *right to know*) through competition among publishers for the attention of the American people on matters of public interest.

*(ii) No substantial use.* It is generally held that the use of

Court to take testimony on the questions of competitive use and substantiality of use of several of the speeches (R. 62).

[17] *Report of Register of Copyrights, supra*, at p. 25.

[18] BALL, *op. cit. supra*, at 262-63. See also JONES, COPYRIGHTS AND TRADEMARKS 66 (1949); Cohen, *op. cit. supra*, at 53; Smith, *op. cit. supra note* 5 at 25; N.Y. Tribune Inc. v. Otis & Co., 39 F. Supp. 67, 68 (S.D.N.Y. 1941).

[19] Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 209 (1954), cited with approval in Loew's Inc. v. Columbia Broadcasting System,

a substantial portion of copyrighted material is not "fair use".[20] The substantiality of the portion used is also related to its importance. According to Judge Yankwich, "the real test involves consideration of (2) the value of the quoted portion" and "the quantity and importance of the portions taken."[21] Consequently, the more important the matter in the public interest, and therefore the more of it that should be brought to the public's attention, the less the applicability of the doctrine of "fair use." No such limitation on the American public's *right to know* derives from the Constitutional right of Free press and it is not in the public interest that it should be permitted through compulsory substitution of "fair use" for the Constitutional right of Free Press.

*(3) "Fair use" no substitute for Constitutional right of Free Press*

Respondent would relegate Freedom of Press to the role of a non-statutory exception to the Copyright Act. Gone would be the public's *right to know;*[22] gone the safeguard of "the widest possible dissemination of information from diverse and antagonistic sources";[23] gone the "right of freely examining public characters and measures, and of free communication thereon";[24] gone the protection for "dissemination of con-

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131 F. Supp. 165, 176 (S. D. Calif. 1955), *aff'd sub. nom.* Benny v. Loew's Inc., for reasons stated by District Judge, 239 F. 2d 532 (9th Cir. 1956), *aff'd per curiam* by equally divided Court, 356 U. S. 43 (1958).

[20] See note 18 *supra;* Toksvig v. Bruce Publishing Co., 181 F. 2d 664, 666-67 (7th Cir. 1950); *Report of Register of Copyrights, supra,* at p. 24; Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 350 (S. D. Calif. 1955).

[21] Yankwich, *op. cit. supra,* at 208, 213.

[22] See H. Rep. No. 1758, 85th Cong., 2d Sess. 17 (quoted in Petition in No. 649, Oct. Term, 1960, at p. 25).

[23] Associated Press v. United States, 326 U. S. 1, 20 (1945).

[24] 6 Writings of James Madison 398 (1906 ed.).

troversial information which the public is entitled to receive" ;[25] —gone, as *Constitutional* rights,[26] all these and other attributes of a Free Press, to be replaced by an undefined, undependable and highly limited doctrine of "fair use". Respondent utterly fails to give any legal justification for thus eviscerating the First Amendment's guaranty of Freedom of Press.

Whatever the applicability of "fair use", Petitioner is also entitled to its Constitutional right of Freedom of Press.

### C. American Press concerned about decision below.

Respondent seeks to give the impression that the case is of no concern to the American press.

Among the many newspapers that have editorially opposed the Respondent's position in this very case are the following: [27]

*Washington Post*, of the District of Columbia
*Des Moines Register*, of Iowa
*Hartford Courant*, of Connecticut
*Portland Journal*, of Oregon
*Raleigh Times*, of North Carolina
*Dallas Morning News*, of Texas
*Spokane Spokesman-Review*, of Washington
*Buffalo News*, of New York
*Honolulu Star-Bulletin*, of Hawaii

Moreover, leaders of the press and of the journalistic profession have objected to the Admiral's copyrighting of these very speeches. The nation's largest professional journalistic society, Sigma Delta Chi, composed of some 20,000 publishers, editors and newsmen embracing all kinds and ranks of jour-

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[25] United States Government's Brief before this Court, quoted in Petition in No. 649, October Term, 1960, at pp. 24-25.

[26] "Fair use" is only a privilege and not a right, Recent Decisions, 3 VILL. L. REV. 381, 383 (1958). Furthermore, it is not even a question of law but one of fact, Eisenschiml v. Fawcett Publications, Inc., 246 F. 2d 598, 604 (7th Cir. 1957), *cert. denied* 355 U. S. 907 (1957).

[27] SCHNAPPER, CONSTRAINT BY COPYRIGHT 89n, 110n, 133-39 (1960).

nalism, sought to file a brief *amicus curiae* in the Court of Appeals, in opposition to the Admiral's position; it was denied permission because of the Admiral's refusal to consent thereto. Mr. V. M. Newton, Jr., Managing Editor of the *Tampa Tribune* and Chairman of Sigma Delta Chi's Freedom of Information Committee, wrote directly to Admiral Rickover, expressing "great concern" and "fear" because of the restrictions on the press (R. 91-92). These, and the views of many other leading editors and of officials of the American Society of Newspaper Editors,[28] indicate the great concern of the American press with the Admiral's attempt to copyright his public speeches.

## II. OTHER ERRONEOUS CLAIMS BY RESPONDENT

### A. Questions of law involved.

Respondent urges that "factual findings" of the two courts below should not be disturbed. The "two court rule" simply does not apply here. There is not a single disputed issue of fact in the record of this case. What *is* involved is the *legal* consequence of the undisputed facts, which raises questions of law that are traditionally subject to appellate review.

This same erroneous claim by Respondent was briefed in Petitioner's Response in No. 739, October Term, 1960, at pages 2-4, to which the Court's attention is respectfully directed.

### B. United States Government's Role

Respondent hopes for advantage from the Government's failure to protect the public character of these speeches (Respondent's Brief, p. 10). This very failure or refusal of the Government to prevent Respondent's illegal behavior, and the Government's participation in this behavior via improper issuance of copyright registration, has deprived Petitioner of his constitutional rights of Freedom of Press (Petitioner's Brief,

[28] *Id.* at 140.

pp. 56-57), and has, to use Respondent's own words, "muzzle[d] the Washington publisher in the free exercise of a right . . . to print anything it desires to print" (Respondent's Brief, pp. 51-52).

Respondent expresses dismay that Petitioner's claim of freedom of access to officially released Government publications "is equivalent to insisting that it obtain its source material free of charge" (Brief, p. 52). Such is precisely the intended meaning and designed effect of the Copyright Law, 17 U.S.C. 8, and the Printing Law, 45 U.S.C. 58, where Congress provided that "Government publications" could not be copyrighted and must be in the public domain. Such also is precisely the meaning of Freedom of Press, guaranteed by the First Amendment, in these circumstances. It means that publicly-released *public* documents must be publicly available to all (assuming no issue of national security or executive privilege). Only this Court can give protection and vitality to this fundamental statutory and constitutional principle, so roundly scorned by Respondent and quietly ignored by the Government in this case.

Respondent's effort to take heart from the Government's inaction must fail for two reasons:

(1) Respondent's claim flies directly in the face of the principle enunciated by this Court that "any error by the Department in the interpretation of the statute cannot confer legal rights inconsistent with its express terms," *Ewart v. Bluejacket*, 259 U. S. 129, 138 (1922); *Prosser v. Finn*, 208 U. S. 67, 74 (1908).

It is a well-established rule of law, frequently stated by this Court, that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit," *Utah Power and L. Co. v. United States*, 243 U. S. 389, 409 (1917).[29]

(2) Respondent's view is that his illegal behavior as a

[29] See also United States v. San Francisco, 310 U. S. 16, 32 (1940);

Government official is waived merely because it is not stopped by the Government, whether out of oversight, disinterest or for other reasons. Such a doctrine, fraught with mischief and contrary to this Court's rulings, has been rejected by the United States Government itself. The Government's views were stated in its brief before this Court submitted last term in the Dixon-Yates case, *United States v. Mississippi Valley Generating Co.*, 364 U. S. 520 (1961):

> "No official is authorized to make exemptions . . . What they were powerless to do directly could not be accomplished indirectly by acquiesance in, or condonation of, or ignorance of violations of the law. [p. 65] . . . We submit that there is nothing cynical in an attempt by the United States to vindicate important statutory rights—vital to the conduct of the Government—of which it was mistakenly deprived by law misinterpretation of law by its own officials. Congress itself has established a governing standard not to be mitigated by the individual views of any public servant." [p. 67]

### C. Dubilier Case on patents is inapplicable

Respondent cites a patent case, *United States v. Dubilier Condenser Corp.*, 289 U. S. 178 (1933), which is inapplicable to the present case for at least four reasons: (1) patents and copyrights are basically different; (2) they contain different statutory bases applicable to Government officials; (3) *Dubilier* is moot; and (4) Respondent comes without "clean hands".

This issue was briefed in Petitioner's Response in No. 739, October Term, 1960, at pages 5-10, to which the Court's attention is respectfully called.

### D. Autobiographical memoirs not germane

Respondent seeks refuge in the fact that other military

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Wilbur Nat. Bank v. United States, 294 U. S. 120, 123, 124 (1935); United States v. Stewart, 311 U. S. 60, 70 (1940). *Cf.* Federal Crop. Ins. Corp. v. Merrill, 332 U. S. 380, 384 (1947).

officers have written books that were privately copyrighted without being "formally questioned" (Brief, p. 29).

Several observations are relevant:

(1) Without intending at this point to characterize the books so noted by Respondent, Petitioner believes that Respondent has thus highlighted one of the critical public issues inherent in this case, the vast system of both conscious and unconscious evasion of statutory restrictions on the copyrighting of "Government publications" which has been practiced by Government agencies, by their officers and employees, and by Government sponsored private agencies operating under contract with the Government. In the Petition for a Writ of Certiorari, No. 649, October Term, 1960, this matter was discussed at pages 18-22, with various illustrative appendices appearing at pages 53-60. Many examples were given there of the private copyrighting of unquestionably official documents (e.g., pp. 53-55).[30]

The very existence of a widespread practice of private copyrighting of "Government publications" requires a decision of this Court which not only will settle the instant case but will also serve the general public interest by ending the continuing erosion of statutory and constitutional requirements.

(2) Petitioner does not claim that every writing by a Government official is a "Government publication". Merely because Pulitzer-prize winning poet Edwin Arlington Robinson worked in the U. S. Customs did not make his poetry a "Government publication", nor did Charles Peirce's many years of government service with the U. S. Coastal and Geodesic Survey thereby convert his seminal writings on pragmatic philosophy into a "Government publication." Nor for that matter—with apologies for personal reference to a few examples of public statements or writings by members of this Court—do "Government publications" result from the release of the Chief Justice's address on medical science, the relationships between

[30] *Query*, whether Respondent's Brief (p. 47, last paragraph) has not added another example within the area of his own official concern?

Federal and State Governments, and the international scene, which he delivered at a university research institute; or from Mr. Justice Clark's speeches on traffic safety, Mr. Justice Frankfurter's *in memoriam* of a distinguished American philosopher who was his roommate, Mr. Justice Whittaker's speech at a college commencement, or Mr. Justice Douglas's books on foreign culture or mountain climbing. Petitioner's main Brief suggests the tests which, in its judgment, determine when a Government official's writing becomes a "Government publication", and these tests do not apply to such writings by Government officers.

With this important distinction in mind, let us look at the books referred to by Respondent (R. 109-110). Substantially all of them were highly personal and autobiographical *memoirs* usually written and published years after the events described. For example, General Omar Bradley, in *A Soldier's Story*, wrote in 1951, after the campaigns of World War II had become history, that these "reminiscences" were his "memoirs" (p. vii); his "Acknowledgement" gave full notice "that this is in part a book of opinion and that the opinion is my own" (p. viii).[31] General Eisenhower described his *Crusade in Europe* (1948) as "a single narrative of my experiences" (480).[32] General Clark spoke of his *Calculated Risk* (1950) as an effort to "explain to my wife what had happened, to give her a better idea of how I felt about people and events . . ." (p. 4)[33] Admiral George Dufek's *Operation Deep Freeze* (1958) told "the way I felt about them" (p. v). Generals

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[31] H. W. Baldwin's review of Bradley's book calls it "subjective . . . full of chit chat", N. Y. TIMES, June 17, 1951, p. 1.

[32] Brinton's review says: "These are General Eisenhower's personal memoirs", 31 SAT. REV. LIT. 9 (Nov. 20, 1948). THE BOOK REVIEW DIGEST for 1948 describes the book as "General Eisenhower's personal narrative" (p. 241). The U. S. QUARTERLY BOOKLIST says: " . . . General Eisenhower has written a political testament . . . ", vol. 5, p. 22, March 1949.

[33] A reviewer describes Clark's book as "memoirs", Marshall, 33 SAT. REV. LIT. 10 (Oct. 21, 1950).

Henry Arnold and Ira Eaker, in *This Flying Game* (1938), include in their Preface (p. xix) a specific disclaimer of official status or opinion, a practice also followed in Admiral George Dufek's *Twenty Million Tons Under The Sea* (1956) (facing the title page), and *Clear the Decks* (1951) (p. v).[34] *General Kenney Reports* (1949) bore a subtitle "*A Personal History of the Pacific War.*"

Two other books mentioned by Respondent are of somewhat different nature. *MacArthur on War* (1942) was edited and copyrighted by Waldrop who wrote an original introduction, three full chapters, an appendix and two supplementary tables for the book. The General's material in the book was taken almost wholly from his uncopyrighted testimony before Congressional committees and his uncopyrighted Annual Reports as Army Chief of Staff. Of Admiral Alfred T. Mahan's *The Influence of Sea Power Upon History, 1660-1783*, two comments are appropriate: (1) it was published in 1890, prior to the enactment of the Printing Law of 1895 and the Copyright Law of 1909; and (2) it dealt with matters over 100 years old.

The books referred to by the Respondent are, thus, not germane to the instant case. For the most part they were highly personalized and autobiographical in nature, and in some instances self-exculpatory. Their authors neither purported to be, nor did their then-held positions make it appear that they were, writing in an official capacity. Here, on the contrary, Respondent did purport so to speak. In other instances cited, it is clear from the works that their authors were writing unofficially because of the manifest personal and autobiographical form of the *memoirs*. In the instant case, exactly the opposite was true; Respondent specifically refused to disclaim official status[35] and used every form of official *imprimatur*

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[34] This book was described as "personal narrative", Book Rev. Dig. 1951, and as a "memoir", 27 New Yorker 187 (Nov. 17, 1951).

[35] Respondent's Brief (pp. 39-40) shows solicitous interest in the need to comply with the *second* sentence of ¶3 of Article 1252, Navy's

by which the Government traditionally conveys to the press and to the American people the official status of such materials.

Furthermore, even if the books could be deemed validly applicable to the present case, which is not the situation, none of them had received judicial sanction. Long-repeated violation of law does not invoke legitimacy upon the violation. *Brown v. Board of Education*, 349 U. S. 294 (1954); *Cooper v. Aaron*, 358 U. S. 1 (1958). Cf: *United States v. E. I. duPont de Nemours*, 366 U. S. 316 (1961).

### E. Official status of Government press releases

Respondent seeks to evade the official ruling by the U. S. Superintendent of Documents, the Library of Congress, the American Library Association, and others, that an official departmental press release is a "government publication" [see Petitioner's Brief, p. 17], by claiming that "the important thing" is that the releases here in question were not listed in the Monthly Catalog of Government Publications (Respondent's Brief, p. 42).

The Respondent is misinformed as to the practice of the Superintendent of Documents. The latter has officially stated that official press releases are "government publications" but he has also announced that his *Monthly Catalog* will *not* list each such press release. In his initial announcement in 1936 that the *Monthly Catalog of United States Government Publications* would thereafter identify official Government press releases as "government publications", the Superintendent of Documents noted that because of their ephemeral character they would not be individually listed in the *Monthly Catalog*:

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General Regulations [requiring submission of copies of all writings], and disdainful disregard for the equally peremptory requirements of the *first* sentence of the same ¶3 [requiring disclaimers for private opinions]. For text of Regulations, see R. 104. Furthermore, could not the solicitude about submitting copies of his speeches have been satisfied by copies that were not official press releases, as was done when copies were submitted to the Copyright Office? (See Petitioner's Brief, ¶3e, page 4).

"It is true that many of these publications both because of the type and paper, are not, in all probability, of permanent value. However, it is considered that since the information given is often the result of careful research, *the public is entitled to know of its existence. Many of the departments and bureaus issue material for the press in this form.* Unless it is issued regularly or in a numbered series, no entry will be made in the Monthly Catalog for such publications since it is considered that that information will be obtained in newspapers and other current periodicals". *Monthly Catalog of U. S. Public Documents*, January 1936, p. 3. (emphasis added)

Twice annually, in February and August of each year, the *Monthly Catalog* includes an Appendix which notes the existence of periodicals, press releases and statistical statements, even although it does not list each publication therein. A standard notation with respect to press releases, for example, is the one appearing in relation to the Atomic Energy Commission, Respondent's employer and one of the government agencies which issued official press releases of many of the speeches here in question. In both the August 1955 issue (just prior to Respondent's first speech) and the February 1961 issue of the *Monthly Catalog* the following notice appeared. The form is from the February 1961 issue, at page 85:

"Releases.

"Note.—These entries are listed for informal purposes only. Because of their ephemeral nature, they are not individually classified and catalogued by the Library of the Division of Public Documents. They are kept in the Library on a temporary basis.

"11892. Press Releases. various paging. 4°. [Issued irregularly. Processed.] Y3.At7:33(date)"

Thus, although for purely administrative reasons official press releases are not individually listed or catalogued in the *Monthly Catalog*, they are, of course, "Government publications."

## CONCLUSION

For the foregoing reasons, and for the reasons presented in our main Brief, the judgment of the Court of Appeals should be reversed in No. 36 and affirmed in No. 55 (to the extent it is necessary to reach this latter issue).

Respectfully submitted.

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tober, 1961